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OFFICE OF PETITIONS

In re Application of Hataker	:	
Application No. 09/751,409	:	Decision on Petition
Filing Date: December 28, 2000	:	
Attorney Docket No. 10559/358001/P10035	:	

This is a decision on the petition under 37 CFR 1.137(b), filed July 9, 2008, to revive the above-identified application.

The petition is **dismissed**.

Facts:

The application papers filed on December 28, 2000, stated all correspondence should be mailed to:

SCOTT C. HARRIS
Fish & Richardson P.C.
4350 La Jolla Village Drive, Suite 500
San Diego, CA 92122

The Office mailed a non-final Office action on June 7, 2004, to the address of record.

Petitioner filed a reply to the non-final Office action on September 10, 2004. The reply did not request the Office change the address of record.

The Office mailed a final Office action on February 16, 2005. The final Office action set a shortened statutory period for reply of three (3) months.

The USPS returned the final Office action to the Office undelivered on February 16, 2005. A USPS stamp on the returned envelope indicates the Office action could not be delivered as addressed.

Since an extension of time under the provisions of 37 CFR 1.136(a) was not obtained, and a reply was not filed, the application became abandoned on May 17, 2005.

An interview summary in the file wrapper indicates the examiner spoke with Scott Harris on the telephone on August 22, 2005. Specifically, the interview summary states, "On above date I spoke with the above mentioned attorney confirming the abandonment of the case."

A Change of Address was filed August 26, 2005. As a result, the address or record was changed to the address associated with Customer No. 20985.

A Notice of Abandonment and copy of the August 22, 2005 Interview Summary were mailed September 21, 2005.

A petition under 37 CFR 1.137(a), signed by Attorney Scott Harris, was filed under 37 CFR 1.137(a) on May 24, 2007.

A decision dismissing the May 24, 2007 petition was mailed on May 6, 2008.

The May 6, 2008 decision stated,

The record indicates Attorney Harris was informed of the application was abandoned during a telephone conversation between the examiner and Attorney Harris on August 22, 2005. The record indicates a Notice of Abandonment was mailed September 21, 2005.

The petition was not filed until May 24, 2007....

If a petition under 37 CFR 1.137(b) is filed, ... petitioner should supply an explanation for the delay in filing a petition to revive. The explanation does not need to be sufficient to prove unavoidable delay. The explanation merely needs to demonstrate the delay in filing the petition was not intentional. .

Discussion:

A grantable petition under 37 CFR 1.137(b) must be accompanied by:

- (1) the reply required to the outstanding Office action or notice, unless previously filed,
- (2) the petition fee,
- (3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional, and
- (4) a terminal disclaimer and fee if the application was filed on or before June 8, 1995 or if the application is a design application.

With respect to item (3) above, petitioner has not explicitly stated the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional. Any request for reconsideration should state, "the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional."

Even if the unintentional statement included all the required language, the petition could not be granted. Normally, a statement is sufficient to satisfy 37 CFR 1.137(b)(3). However, 37 CFR 1.137(b)(3) allows the Office to request further information regarding the "unintentional" delay. In this case, the facts raise a question as to whether the entire delay in filing a petition under 37 CFR 1.137(b) was unintentional. Where there is a question whether the delay was unintentional, the petitioner must meet the burden of establishing that the delay was unintentional within the meaning of 35 U.S.C. § 41(a)(7) and 37 CFR 1.137(b).

The instant petition fails to explain the entire delay in the submission of a petition to revive. Specifically, the petition fails to explain the delay between the date the examiner orally informed Attorney Scott Harris of the abandonment of the file (August 22, 2005) and the date the first petition was filed (May 24, 2007). Therefore, the petition is dismissed. Any request for reconsideration must address the delay between August 22, 2005, and May 24, 2007.

Any request for reconsideration must be submitted within TWO (2) MONTHS from the mail date of this decision. No further petition fee is required for the request. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(b)."

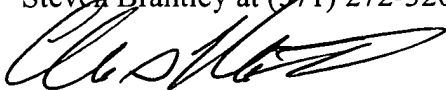
Any future correspondence with respect to this matter, unless filed by EFS, should be addressed as follows:

By mail: Mail Stop Petition
 Commissioner for Patents
 P.O. Box 1450
 Alexandria, VA 22313-1450

By facsimile: (571) 273-8300
 Attn: Office of Petitions

By hand: U.S. Patent and Trademark Office
 Customer Service Window
 Randolph Building
 401 Dulany Street
 Alexandria, VA 22314

Telephone inquiries regarding this communication should be directed to Petitions Attorney Steven Brantley at (571) 272-3203.



Charles Steven Brantley
Senior Petitions Attorney
Office of Petitions